Nos. 92-482 and 92-645

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Supreme Court of the United States

OCTOBER TERM, 1992

THE CHASE MANHATTAN BANK, N.A.,
Petitioner,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
Respondents.

STEPHEN R. STEINBRINK, IN HIS OFFICIAL CAPACITY AS ACTING COMPTROLLER OF THE CURRENCY, AND THE OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Petitioners,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

With the consent of the parties pursuant to Rule 37.2 of this Court, *amicus curiae* The New York Clearing House

Association (the "Clearing House") respectfully submits this brief in support of the petitions for a writ of certiorari (the "Petitions") filed, respectively, by The Chase Manhattan Bank, N.A. ("Chase") and by the Solicitor General on behalf of the Acting Comptroller of the Currency and the Office of the Comptroller of the Currency (the "OCC").

INTEREST OF *AMICUS CURIAE*

The Clearing House is an unincorporated association of eleven leading commercial banks in the City of New York, including Chase.[1] Five of the Clearing House member banks are national banking associations subject to the National Bank Act (the "NBA")[2] and the supervision and guidance of the OCC. The Clearing House regularly appears as an *amicus curiae* in cases concerning important questions of law relating to banking.

The Clearing House's interest in the issues presented in the Petitions derives both from the member banks' interest and involvement in the sale of title insurance and other types of insurance-related products that are incidental to the business of banking, and from the member banks' shared concern for the recognition and consistent application of clear and certain rules of law to the business of banking.

In addition to Chase, other Clearing House member banks are interested in acting as agents for the sale of title

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[1] The other members of the Clearing House are The Bank of New York, Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank, and Republic National Bank of New York.

[2] Ch. 106, 13 Stat. 99 (1864) (codified, as amended, in sections of 12 U.S.C.)

insurance. Member banks are also interested in the sale of other insurance-related products permitted under Section 24 (Seventh) of the NBA, 12 U.S.C. § 24 (Seventh) ("Section 24 (Seventh)"). The products that national banks are authorized to sell include municipal bond insurance, credit life insurance, credit disability insurance, mortgage life insurance and mortgage disability insurance.

The Second Circuit's decision here creates a double conflict with decisions of the United States Court of Appeals for the D.C. Circuit that gives rise to crippling uncertainty within the commercial banking industry. Specifically, the decision below conflicts directly with the D.C. Circuit's holding in *Independent Ins. Agents of America* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, Nos. 92-484 & 92-507, that Congress has repealed 12 U.S.C. § 92 ("Section 92"). In addition, the Second Circuit's holding that Section 92 impliedly bars national banks in jurisdictions of more than 5,000 inhabitants from engaging in insurance-related activities that are incidental to the business of banking is inconsistent with the D.C. Circuit's determination in *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), that Section 92 does not prohibit national banks, wherever located, from brokering credit life insurance. The exercise of this Court's plenary jurisdiction is necessary to resolve both conflicts.

Clearing House member banks and other national banks that are engaged in the sale of insurance-related products are now left to guess as to the scope of their authority and the stability of the business relationships into which they have entered. Such confusion inevitably deters national banks from exercising the full extent of their powers under the NBA and thereby impedes their ability to compete effectively with other financial institutions in a difficult economic environment and

inhibits them from pursuing potentially lucrative commercial opportunities.

SUMMARY OF ARGUMENT

This Court should grant certiorari to settle the uncertainty concerning the permissible scope of national bank powers under Sections 92 and 24 (Seventh). The decision below creates a conflict between the Second and D.C. Circuits as to whether Section 92 was repealed by Congress and, if not, whether Section 92 impliedly bars national banks located in municipalities with more than 5,000 inhabitants from acting as agents for the sale of title insurance and other insurance-related products. This conflict has created confusion within the commercial banking community as to the permissible scope of national bank powers and uncertainty regarding the insurance-related activities in which Clearing House member banks and other national banks currently engage.

At a minimum, the conflict of authority engenders anomalous geographic distinctions resulting in competitive inequities. National banks in the Second Circuit are authorized to engage in the range of activities permitted by Section 92, whereas national banks located in circuits that follow the D.C. Circuit's holding would lack such authority. By contrast, attempts could be made to extend the Second Circuit's construction of Section 92 to prohibit national banks in the Second Circuit from conducting banking activities under Section 24 (Seventh) that are available to national banks in other jurisdictions. The Second Circuit's opinion would, thus, allow matters that are of importance to the financial community to depend upon the happenstance of a bank's location. Aside from these conflicts, the Second Circuit's misconstruction of Section 92 potentially has serious adverse consequences for all national banks because it could provide the basis for litigation seeking to deprive national

banks of the power to engage in a wide range of activities that have been authorized, and are being conducted, as incidental to the business of banking under Section 24 (Seventh).

In addition, the Second Circuit's disregard for and sharp departure from established principles of judicial deference to administrative interpretations and for the precedent interpreting Section 92 undermine the ability of banks to proceed, frequently expending significant time and money, in reliance on the interpretations of the OCC and other banking agencies. In its opinion below, the Second Circuit acknowledged its obligation to defer, in the absence of clear congressional intent to the contrary, to the reasonable interpretation of a statute by the agency charged with its administration. However, the court then proceeded to ignore this obligation and the explicit language of Section 92 supporting the OCC's determination in this matter and to substitute its own construction of the statute. By paying mere lip service to the principle of judicial deference while undercutting its application, the Second Circuit has opened the door to inconsistent interpretations and applications of the rules governing commercial banking relations and has robbed national banks of essential confidence in the determinations of the OCC.

ARGUMENT

A. The Conflict Between the Second and D.C. Circuits Regarding the Existence of Section 92 Creates Confusion for the Commercial Banking Industry.

In holding that Section 92 remains valid law, the Second Circuit disagreed with a recent decision of the D.C. Circuit which had held that that section had been repealed by the

omission of the pertinent text from a 1918 reenactment of Section 5202 of the Revised Statutes of the United States. *See Independent Ins. Agents of America* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, Nos. 92-484 & 92-507. This dispute as to the existence of Section 92 will likely recur in other circuits,[3] and creates intolerable confusion for all national banks. Moreover, the resolution of this conflict could have a significant impact on judicial construction of the scope of the powers granted to national banks under Section 24 (Seventh). If this Court were to hold that Section 92 had been repealed, that statute could not — contrary to the Second Circuit's holding — "impliedly bar" national banks in municipalities of more than 5,000 inhabitants from brokering title insurance. The only remaining issue, then, would be the one that the Second Circuit declined to reach, *i.e.*, whether national banks are permitted to act as agents for the sale of title insurance under Section 24 (Seventh). (*See* Chase Petition at 13).

The uncertainty as to the existence of a provision of the NBA that was enacted more than seventy-five years ago is plainly detrimental to the coherent development and application of the rules governing the activities of national banks.[4]

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[3] *See, e.g.*, *Owensboro National Bank* v. *United States*, No. 91-3 (E.D. Ky, Aug. 4, 1992), in which the court rejected a challenge to the validity of Section 92 that had been raised "[r]elatively late in the briefing of [that] case," and agreed "with the rationale of the Second Circuit" below. *Id.*, slip op. at 14-15.

[4] Although courts and commentators have previously acknowledged that there may be some doubt as to Section 92's repeal, no direct conflict between circuits has arisen until now. Prior to this conflict, the courts and the OCC generally assumed that Section 92 continues to exist. For example, in *Commissioner of Internal Revenue* v. *First Security Bank of Utah*, 405 U.S. 394, 401, n.12

(continued...)

As a result, the split of authority creates confusion as to the stability of existing arrangements entered into by national banks pursuant to Section 92 and the ability of national banks to continue to engage in such activities in the future. Currently, approximately 179 national banks in fifteen states conduct insurance-related activities pursuant to Section 92. *See Owensboro National Bank* v. *United States*, No. 91-3, slip. op. at 10 (E.D. Ky. Aug. 4, 1992). The conflict between the circuit courts is especially significant because these national banks have expended, and continue to expend, substantial effort and expense to develop programs and business relationships for providing the products and services permitted under Section 92. Unless this Court resolves this

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[4](...continued)

(1971), this Court noted without further comment:

> Section 92 of the National Bank Act was enacted in 1916. When the statutes were revised in 1918 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code. However, the Comptroller of the Currency considers § 92 to be effective and he still incorporates the provision in his Regulations, 12 C.F.R. §§ 2.1-2.5 (1971).

See also First National Bank of Lamarque v. *Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980); *Independent Ins. Agents of America, Inc.* v. *Board of Governors*, 736 F.2d 468, 476-77 (8th Cir. 1984); *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert denied*, 449 US. 823 (1980); *Commissioner of Internal Revenue* v. *Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966).

Commentators similarly have expressed the view that Section 92 technically was repealed as a result of the "error of a careless codifier," but remains valid law. Howard H. Hackley, *Our Baffling Banking System - Part II*, 52 Va. L. Rev. 771, 778 (1966); *see also* Richard M. Whiting & James E. Scott, *A Guide to the Federal Law of Banking and Insurance* § 4.2(a), at 81 n.31 (1991)..

conflict, national banks would be left with the unenviable dilemma of either refraining from pursuing this significant source of revenue or continuing to engage in activities that are now subject to question.

The conflict also engenders arbitrary geographic distinctions within the commercial banking industry. National banks located in towns of fewer than 5,000 inhabitants within the Second Circuit, or in any circuit that does not follow the D.C. Circuit's holding, would continue to be able to offer their customers general forms of insurance, such as fire and life insurance, pursuant to Section 92. By contrast, any court applying or following the D.C. Circuit's holding would prohibit national banks in similar locations from engaging in such activities.

Indeed, the conflict may well impair the ability even of national banks located within the Second Circuit to engage in insurance activities under Section 92. In view of the intercircuit conflict, the OCC may be reluctant to lend necessary interpretive guidance concerning the application of Section 92. Moreover, because, under 28 U.S.C. § 1391(e), venue for actions against the OCC or the Comptroller of the Currency could lie in the District of Columbia, even an OCC authorization to a national bank in the Second Circuit to sell certain forms of insurance could be challenged in the courts of the D.C. Circuit, which may prohibit the bank from engaging in such activities. As a result, the possibilities for unseemly forum shopping created by the conflict are obvious. More importantly, national banks located in the Second Circuit are now confronted with constant uncertainty as to whether their authority to engage in acts permitted by their home circuit could be revoked through chance litigation in a distant court.

The conflict between the circuits regarding the existence of Section 92 has created disruptive confusion and clearly

impairs the orderly recognition and coherent application of rules of banking law. Only review by this Court can restore the necessary certainty and uniformity.

B. The Second Circuit's Decision Conflicts With the D.C. Circuit's Determination That Section 92 Does Not Bar National Banks in Towns of More Than 5,000 Inhabitants from Engaging in Certain Insurance-Related Activities, and Engenders Uncertainty for National Banks.

The Second Circuit's holding that Section 92 "impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general," (OCC Appendix at 16a)[5] conflicts with the D.C. Circuit's determination in *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), that Section 92 does not prohibit national banks from brokering credit life insurance under the incidental powers clause of Section 24 (Seventh). In *Heimann*, the D.C. Circuit rejected the rationale that later premised the Second Circuit's holding, concluding instead that, "[b]y its own terms, [Section 92] does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Id.* at 1170 & n.18.

As is the case with respect to the conflict concerning the existence of Section 92, this division engenders irrational geographic distinctions regarding the permissible scope of national bank powers. National banks located within the Second Circuit are precluded by the decision below from

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[5] Citations in the form of "OCC Appendix at __" are to the Appendix to the Petition filed by the Solicitor General.

brokering title insurance, while courts following *Heimann* would not interpret Section 92 to bar such activity. Thus, the Second Circuit's decision unfairly deprives national banks located within that circuit of a potentially important source of revenue.[6] This discrepancy significantly prejudices the competitive position of the Clearing House members that are national banks, which generate billions of dollars in real estate loans annually.

Moreover, as the Petitions demonstrate (Chase Petition at 15-16; OCC Petition at 17-18), national banks in all jurisdictions presently engage in a wide range of other activities that are incidental to the business of banking.[7] As a result of the current circuit conflict, however, a national bank's continued authority to engage in such activities could depend solely upon the fortuity of the bank's location. The Second Circuit's holding concerning the brokerage of title insurance might improperly be extended to preclude national banks from performing these other insurance-related activities, even though national banks located outside the Second Circuit may engage in such conduct. Thus, the Second Circuit's decision threatens to deprive national banks of important business opportunities and impairs their ability to compete with state banks, savings and loan associations and other financial institutions that are permitted to offer insurance-related products. In any event, the uncertainty regarding the reach of

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[6] As this Court recognized in *Federal Trade Commission* v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2173 (1992), the title insurance industry earns revenues in excess of a billion dollars per year.

[7] Among the insurance-related products that national banks have been authorized to offer as agents are municipal bond insurance, credit related life insurance, mortgage life insurance, credit disability insurance, involuntary unemployment insurance and vendor's single interest insurance. (OCC Petition at 17-18; Chase Petition at 15-16).

the Second Circuit's decision could mire national banks in endless litigation that would distract them from their banking activities and compel them to expend substantial resources to defend against challenges to their operations.

The conflicting interpretations of Section 92 create fundamental confusion as to both the ability of national banks to continue to engage in these activities and the stability of the brokerage agreements and other business arrangements relating to these services. In reliance upon the post-*Saxon*[8] judicial decisions construing Section 92 and the OCC's approval of national banks' involvement in these activities, national banks have invested—and continue to invest—substantial effort and expense to develop programs and commercial relationships for carrying out these activities. The confusion resulting from the conflict between the circuits threatens the commercial banking industry with gridlock that could hinder, if not prevent, national banks from proceeding with these projects and subjects current business arrangements and relationships to uncertainty.[9]

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[8] *See Saxon* v. *Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968).

[9] Moreover, to the extent that national banks are deterred by this uncertainty from brokering insurance-related products that are incidental to the business of banking under Section 24 (Seventh), consumers of those products would be deprived of alternative sources of those products and of the salutary benefits of competition among the providers of those products.

C. The Decision Below Fails to Follow the Principles of Judicial Deference Outlined in *Chevron* and Undermines the Reliability of OCC Interpretations of the NBA.

The Second Circuit's departure from the basic principle of judicial deference in its unwarranted reversal of the OCC's determination, which was based on the OCC's entirely rational interpretation of the NBA, has serious adverse repercussions for the commercial banking industry. The OCC is the federal agency specifically charged with the supervision and regulation of national banks and the administration of the NBA. In the conduct of their daily business, national banks, including a number of the Clearing House member banks, are compelled by law and business necessity to rely on the OCC's interpretations of the permissible scope of national bank activities. Regulatory predictability and stability are indispensable to the business of commercial banking, and judicial invalidation of entirely rational OCC determinations is highly disruptive.

More generally, banks are subject to a comprehensive statutory scheme of regulation that pervades every aspect of their operations and procedures. Many aspects of this scheme are specifically left to implementing regulations of the banking agencies. Other aspects of this scheme, particularly those that were enacted many years ago, require interpretation and, frequently, reinterpretation in order to account for financial, economic and technological developments. If banks cannot rely on the regulations and interpretations promulgated by their regulators, they would be unable to serve the demands and needs of their customers and their competitive position and earnings would inevitably deteriorate.

This Court has long recognized the necessity of deferring "to [a regulatory agency's] construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnotes omitted); *See also Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987) (applying the *Chevron* principle to the OCC's interpretation of federal banking laws). *Chevron* establishes the following framework for review of such agency interpretations: First, a court must give effect to the unambiguously expressed intent of Congress. If, however, the statute is silent or ambiguous with respect to the issue addressed by the regulatory determinations, the reviewing court should assess only whether the agency's interpretation is based on a "permissible construction of the statute." *Id.* at 842-43.

The bank regulators are not, of course, immune from judicial reversal when they depart from the clear intention of a statute. However, the courts may substitute their judgments for those of the regulators only in the case of such a departure, and not when the regulators' interpretation "is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843 & n.11; *see also, Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403-404.

The OCC consistently has construed Section 92 as a *supplemental* grant of authority providing additional sources of revenue for national banks located in small towns, and not as an exclusive source of insurance powers. *See, e.g.*, Comptroller Interpretive Ltr. No. 499, *reprinted in* [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 at 71,213 (Feb. 12, 1990) (national banks permitted to broker annuities). As the Petitions demonstrate (OCC Petition at 11-13; Chase Petition at 14-17), this interpretation is supported

both by the language and legislative history of the statute and by recent judicial interpretations of Section 92.[10]

The Second Circuit acknowledged its obligation under *Chevron* to give effect to the unambiguously expressed intent of Congress and recognized that, where the statute is silent or ambiguous with respect to the matter at issue, the court should inquire only as to whether the OCC's interpretation is "'arbitrary, capricious or manifestly contrary to the statute.'" (OCC Appendix at 12a) (quoting *Chevron*). It nonetheless rejected the OCC's position, stating simply that "we believe that the language of section 92 evinces Congress' intent to bar national banks that fall outside of the provision's geographical restrictions from acting as insurance agents." (OCC Appendix at 13a). The court took this position although it conceded that Section 92 "provides no explicit limitation on national bank activity." (*Id.* at 13a).

It is difficult to conceive of a more direct repudiation of *Chevron*. In the first instance, the court ignored the explicit statement in Section 92 that the powers conferred by that section were "*in addition* to the powers vested by law in national banking associations." 12 U.S.C. § 92 (emphasis added). This statement clearly indicates that Congress had authorized national banks to engage in *other* insurance powers *in addition* to those granted under Section 92.

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[10] *See Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d at 1170, n.18 ("[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies"); *Independent Ins. Agents* v. *Board of Governors*, 736 F.2d 468, 477 n.6 (8th Cir. 1984) ("[t]he legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance").

As the Petitions demonstrate (OCC Petition at 11-16; Chase Petition at 19-24), the court attempted to support its strained contrary construction of Section 92 by the maxim of *expressio unius est exclusio alterius*, which it misapplied, and the legislative history of that provision, which it misinterpreted.

The use of these statutory construction tools is dubious at best in view of the clear statutory language. They are totally inappropriate under *Chevron* when used to overturn an administrative agency's determination that is not precluded by the maxim of *expressio unius* and can be read consistently with the legislative history. Even if it had been appropriate to apply the maxim of *expressio unius* in construing the statute, that analysis could have demonstrated at most that Section 92 impliedly bars national banks in municipalities with more than 5,000 inhabitants from engaging in general insurance activities if such activities are not incidental to the business of banking. Section 92 does not address—and, thus, the maxim cannot be invoked to restrict—the powers granted to national banks by Section 24 (Seventh) to engage in insurance-related activities that *are* incidental to the business of banking. (*See* Chase Petition at 23).

The Second Circuit also relied on legislative history that, in fact, demonstrates that Section 92 had been enacted to provide supplemental insurance powers to national banks in small towns, and not to prohibit the ability of national banks to engage in insurance-related activities that are incidental to the business of banking under Section 24 (Seventh). (OCC Petition at 12-15; Chase Petition at 23-24). In short, the legislative history supports the OCC's interpretation of Section 92 or, at least, raises sufficient ambiguity regarding the meaning of that provision to have required the Second Circuit to defer to the OCC's determination. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 844.

Thus, although the Second Circuit purported to pay heed to the principles of judicial deference set out in *Chevron,* it, in fact, impermissibly substituted its own reading of Section 92 for that of the OCC, the agency specifically charged by Congress to interpret and administer the NBA. By failing to defer to the OCC's interpretation, the decision below paves the way for courts to supplant their construction of the NBA for the reasoned interpretations of the OCC, even where the regulator's interpretation is consistent with the statute's language and legislative history. Such an approach would result in piecemeal and inconsistent application of the federal banking laws and hinder the development of a coherent body of law for the national banking community.

CONCLUSION

For the reasons stated in the Petitions and herein, certiorari should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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